

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 99-68

In the Matter of

Implementation of the Local Competition Provisions
in the Telecommunications Act of 1996

Inter-Carrier Compensation for ISP-Bound Traffic

**Comments of the
Information Technology Association of America**

The Information Technology Association of America ("ITAA") submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceeding.¹ In the *Notice*, the Commission has requested comment regarding an issue of particular concern to ITAA and its Members – whether dial-up traffic bound for Internet service providers ("ISPs") can be separated into intrastate and interstate components. Consistent with the undisputed facts, the agency's established position, and the decision of the Eighth Circuit in the *Access Charge Appeal*, the Commission should declare that ISP-bound traffic is jurisdictionally mixed and inseverable.

¹ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, FCC 99-38, CC Docket Nos. 96-98, 99-68 (rel. Feb. 26, 1999) ("*Declaratory Ruling and Notice*").

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INTRODUCTION

ITAA is the principal trade association of the information technology industry. Together with its twenty affiliated regional technology councils, ITAA represents more than 11,000 companies located throughout the United States. ITAA's members provide the public with a wide variety of information products, software, and services. Among the most significant of these offerings are Internet access and other on-line information services.

In the *Declaratory Ruling*, the Commission held that dial-up traffic bound for ISPs is jurisdictionally mixed,² but declined to determine whether such traffic can be separated into interstate and intrastate components. Instead, the agency requested comment on this severability issue.³

As explained below, the Commission has asserted previously, and the Eighth Circuit has found, that traffic between ISPs and their subscribers cannot be separated into discrete intrastate and interstate components. Consistent with this record, the Commission should confirm that ISP-bound traffic is jurisdictionally inseverable. In addition to being factually accurate, such a finding would serve two important policies. First, it would support the Commission's long-standing decision – reiterated in the *Declaratory Ruling* – to allow information service providers to purchase state-tariffed business lines, rather than federally tariffed interstate access services.⁴ Second, declaring ISP-bound traffic to be jurisdictionally

² See *id.* at ¶ 19.

³ See *id.* at ¶ 36.

⁴ See *id.* at ¶ 19; *Access Charge Reform*, 12 FCC Rcd 15982, 16131 (1997), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998); *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2635 (1988); *MTS and WATS Market Structure*, 97 FCC2d 682, 715 (1983).

inseverable would preserve the Commission's ability to preempt State rules that are inconsistent with the agency's pro-competitive policies for information services.

I. DIAL-UP TRAFFIC BOUND FOR ISPs IS JURISDICTIONALLY INSEVERABLE

In the *Notice*, the Commission has requested comment on whether it should adopt rules to govern interstate traffic bound for ISPs, while permitting the States to adopt potentially conflicting rules governing jurisdictionally intrastate ISP-bound traffic.⁵ This request is based on the assumption that, as in the voice telephony environment, a particular call to the Internet can be classified as interstate or intrastate. Such a classification, however, cannot be made.

In a typical configuration, a subscriber sends a request for information from his or her premises, over local telecommunications facilities, to the subscriber's ISP. The ISP, in turn, routes the request, over the Internet, to a World Wide Web computer server that contains the information desired by the subscriber. Once on "the Web," the subscriber may "click" on hypertext links to "jump" from one Website to another. As the Commission has recognized, during the course of a single on-line session, a subscriber may interact with Websites housed in servers located in the same State as the subscriber, a different State, or even another country.⁶ Neither the subscriber, nor the ISP, nor the serving LEC typically has any way of knowing the geographic location of the computer servers accessed during an on-line session.

⁵ See *Declaratory Ruling and Notice* at ¶ 36.

⁶ See *id.* at ¶ 18.

To further complicate matters, popular Internet content is increasingly being cached in "proxy" servers located close to major metropolitan areas. This practice is intended to ease the strain placed on network resources by permitting users to access information without having to download it from a remote server. Again, neither a subscriber, nor the subscriber's ISP, nor the serving LEC has any way of ascertaining whether the subscriber is interacting with information "cached" in a nearby server or stored in a remote server located in another state.⁷

The jurisdictional nature of ISP-bound traffic is not a new issue for the Commission. In the *Access Charge Appeal*, the Commission argued persuasively that traffic between a subscriber and the subscriber's ISP is jurisdictionally mixed and inseverable.⁸ The U.S. Court of Appeals for the Eighth Circuit agreed with the agency. The court observed that:

As the FCC argues, the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements. *See California v. FCC*, 905 F.2d 1217, 1244 (9th Cir. 1990). Consequently, the FCC has determined that the facilities used by ISPs are "jurisdictionally mixed," carrying both interstate and intrastate traffic. FCC Brief at 79 . . . [T]he FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate . . .⁹

⁷ In some cases, ISP-bound traffic may be intrastate, interstate, and international simultaneously. For example, a user can send a "broadcast e-mail" to recipients in the same state, across the country, and in a different country.

⁸ See Brief of Federal Communications Commission, *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618, 8th Cir. 1997, at 79 ("FCC Brief"); see also Kevin Werbach, Office of Plans and Policy, Federal Communications Commission, "Digital Tornado: The Internet and Telecommunications Policy," at 45 (Mar. 1997) ("For an Internet connection, . . . the user may have no idea where the sites he is viewing are located. One Internet 'call' may connect the user to information both across the street and on the other side of the world. Furthermore, dynamic routing means that packets may take different routes across the Internet to reach the same site, so even the location of the site the user is contacting does not provide sufficient information to identify the routing of the call for jurisdictional purposes."). As the Commission has recognized, several ILECs have reached this same conclusion. See *Declaratory Ruling and Notice* at ¶ 19.

⁹ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

Given the undisputed facts, Commission's prior assertions, and the Eighth Circuit's findings, the jurisdictional nature of dial-up traffic between a subscriber and the subscriber's ISP is settled. Accordingly, the Commission should take advantage of this proceeding to make clear that dial-up traffic bound for ISPs is jurisdictionally mixed and inseverable.¹⁰

II. CONFIRMING THAT ISP-BOUND TRAFFIC IS JURISDICTIONALLY MIXED AND INSEVERABLE WOULD ENSURE THAT ISPS CAN CONTINUE TO PURCHASE STATE-TARIFFED BUSINESS LINES

Reaffirming that ISP-bound traffic is inseverable would advance important policy goals. Since 1983, the Commission has consistently held that ISPs may purchase the same state-tariffed local business lines as other end-users.¹¹ The Commission reaffirmed this conclusion in

¹⁰ While recognizing that ISP traffic is jurisdictionally mixed, the *Declaratory Ruling* suggests that a "substantial portion" of such traffic is jurisdictionally interstate. *Declaratory Ruling and Notice* at ¶ 18. In support of this assertion, the Commission cites a handful of comments, but provides no independent analysis. The comments cited by the Commission, however, provide no persuasive support for the agency's assertion. *See id.* at n.71. Indeed, one of the commenters, WorldCom, argues that calls to ISPs are local. *See Reply Comments of WorldCom, Inc.*, CCB/CPD 97-30 at 8, 9 (July 31, 1997). Several other commenters, such as Bell Atlantic, Adelphia, and CompuServe, assert that calls to ISPs are interstate, but provide no data to support their belief. *See* Letter from Edward Young, Bell Atlantic to Chairman Kennard, CCB/CPD 97-30, Att. 2 (July 1, 1998); *Comments of Adelphia, et. al.*, CCB/CPD 97-30, at 22 (July 17, 1997); *CompuServe Comments*, CCB/CPD 97-30, at 4 (July 17, 1997). While SBC points to a "study" to support its belief that over 90 percent of the Internet traffic in its region is interstate, the study is not included in the record or even described. Moreover, SBC readily acknowledges that "the jurisdiction of Internet calls cannot practically be measured or reported." *See* Letter from Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications, Inc., to Magalie Roman Salas, Secretary, FCC, Att. at 7 (May 13, 1997). The Eighth Circuit similarly has determined that the Commission "cannot reliably separate the two components involved in completing a particular [Internet] call, or even determine what percentage of overall ISP traffic is interstate or intrastate." *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

¹¹ *See MTS and WATS Market Structure*, 93 FCC2d 241 (1983); *Amendment of Part 69 of the Commission's Rules Related to Enhanced Service Providers*, 3 FCC Rcd 2631, 2632-33 (1988); *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 167-69 (1988); *Amendment of Part 69 of the Commission's Rules Related to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4534 (1991).

the *Access Charge Reform Order*.¹² Several of the ILECs subsequently appealed the agency's decision to the Eighth Circuit. These carriers asserted that ISP-bound traffic is jurisdictionally interstate and, therefore, that the Commission could not allow the cost of this traffic to be recovered out of State tariffs. Instead, the ILECs asserted that these costs should be recovered through the same federally tariffed interstate access services used by interexchange carriers.

The Eighth Circuit rejected the ILECs' position. Relying on the Commission's conclusion that ISP-bound traffic is jurisdictionally mixed and inseverable,¹³ the court found, the agency has significant "discretion" to share with the States responsibility for regulating this traffic.¹⁴ The Commission, the court went on, appropriately exercised this discretion by allowing the cost of ISP-bound traffic to be recovered through a combination of State business line rates and federal end-user charges, such as the Subscriber Line Charge.¹⁵

If the Commission were to reverse course and declare that ISP-bound traffic can be severed into discrete interstate and intrastate components, the ILECs could be expected to object to ISPs' continued use of State-tariffed business lines to receive traffic that could be classified as jurisdictionally interstate. These carriers are likely to insist that the cost of the facilities used to transport this traffic be recovered through a federal regime. To avoid reopening the question whether ISPs must be subject to the federal carrier access charge regime, the

¹² See *Access Charge Reform*, 12 FCC Rcd 15982, 16134 (1997), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

¹³ See *FCC Brief* at 79.

¹⁴ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998);

¹⁵ See *id.*

Commission – consistent with the facts, the agency’s previous assertions, and the findings of the Eighth Circuit – should declare that ISP-bound traffic is jurisdictionally mixed and inseverable.

III. CONFIRMING THAT ISP-BOUND TRAFFIC IS JURISDICTIONALLY INSEVERABLE WOULD PRESERVE THE COMMISSION’S PREEMPTION AUTHORITY

Recognizing that ISP-bound traffic is jurisdictionally inseverable also is necessary to protect the Commission’s jurisdiction. ITAA recognizes the need for the Commission to work cooperatively with the States and supports such efforts. At the same time, however, the Association believes that the Commission must preserve its ability to preempt any State regulation of information services (and of telecommunications services used by ISPs) that would be inconsistent with the agency’s pro-competitive policies.¹⁶

The courts have made clear that the Commission may only preempt State regulation if each of three conditions is satisfied: (1) the service or facility is jurisdictionally mixed; (2) it is not possible – as a matter of economic feasibility or technical practicality¹⁷ – to separate the service or facility into intrastate and interstate components; and (3) the state regulation would “thwart or impede” a valid Commission policy.¹⁸ Under this framework, the

¹⁶ ITAA has long supported Commission preemption of state regulations that are inconsistent with the agency’s policies for information services. See Brief of Respondent-Intervenors, *Georgia Pub. Serv. Comm’n v. FCC*, 1993 U.S. App. LEXIS 24458 (11th Cir. 1993) (No. 92-8257); Brief of Respondent-Intervenors in Support of the Federal Communications Commission on the Preemption Issue, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (No. 92-70083).

¹⁷ See *California PSC v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990).

¹⁸ See *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *California PSC v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); *California PSC v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990); *NARUC v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989); see also J. Nadler, *Give Peace a Chance: FCC-State Relations After California III*, 47 Fed. Comm. L. J. 457 (1995).

Commission is powerless to preempt a state rule that can be limited to intrastate matters, even if the rule is entirely inconsistent with federal policies.¹⁹ In the present case, the Commission has already determined that traffic between subscribers and their ISPs is jurisdictionally mixed. In order to preserve its authority to preempt State regulations that would impede its pro-competitive policies for ISP-bound traffic, the Commission must confirm that such traffic cannot be separated into discrete intrastate and interstate components.

¹⁹ See *Louisiana PSC*, 476 U.S. at 370 (The Court held that the Commission could not preempt a state rule providing for relatively slow depreciation of the intrastate component of jurisdictionally mixed facilities, even though the rule differed from the more rapid federal method used to depreciate the interstate component of the facilities and undermined the Commission's policy of promoting the rapid deployment of new network technologies).

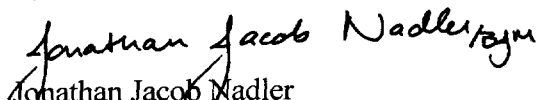
CONCLUSION

Consistent with the nature of ISP-bound traffic, the agency's established position, and the findings of the Eighth Circuit, the Commission should find that traffic between subscribers and their ISPs cannot be separated into intrastate and interstate components.

Respectfully submitted.

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